

WILKINSON) BARKER) KNAUER) LLP

2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037
TEL 202.783.4141
FAX 202.783.5851
www.wbklaw.com
L. CHARLES KELLER
202.383.3414
ckeller@wbklaw.com

July 15, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Notice of ex parte presentation, WC Docket No. 07-245*

Dear Ms. Dortch:

On July 14, 2008, PCIA–The Wireless Infrastructure Association (“PCIA”) and its membership section, The DAS Forum, made separate ex parte presentations to Amy Bender, legal advisor to Chairman Kevin Martin; Scott Bergmann, legal advisor to Commissioner Jonathan Adelstein; and John Hunter, legal advisor to Commissioner Robert McDowell. In the meetings, PCIA was represented by Jacqueline McCarthy of PCIA; Catherine Blue, partner at Donahue & Blue and chair of The DAS Forum’s Advocacy Committee; Michael Cooper, Manager of Infrastructure Rights and Permitting, Lighttower of Boxborough, Massachusetts; Indra Chalk, Senior Corporate Counsel for T-Mobile USA, Inc.; and undersigned counsel for PCIA.

In the meetings, PCIA’s arguments followed the attached presentation, which was also distributed to the attendees.

Sincerely,

WILKINSON BARKER KNAUER, LLP

By: /s/
L. Charles Keller

Enclosure

cc: Amy Bender
Scott Bergmann
John Hunter



Pole Attachment Issues

Federal Communications Commission
July 14, 2008

PCIA & The DAS Forum

- PCIA is the nation-wide non-profit trade association representing the wireless telecommunications and broadband infrastructure industry.
- Our members own/operate over 115,000 wireless facilities nationwide. Members include tower companies, wireless carriers, and service companies.
- About the DAS Forum:
 - Founded in 2006, the DAS Forum, a membership section of PCIA, is the only national network of leaders focused exclusively on shaping the future of DAS as a viable complement to traditional macro cell sites and a solution to the deployment of wireless services in challenging environments.
 - DAS Forum members own and manage all of the neutral host and many of the carrier-owned outdoor DAS installations in the U.S.

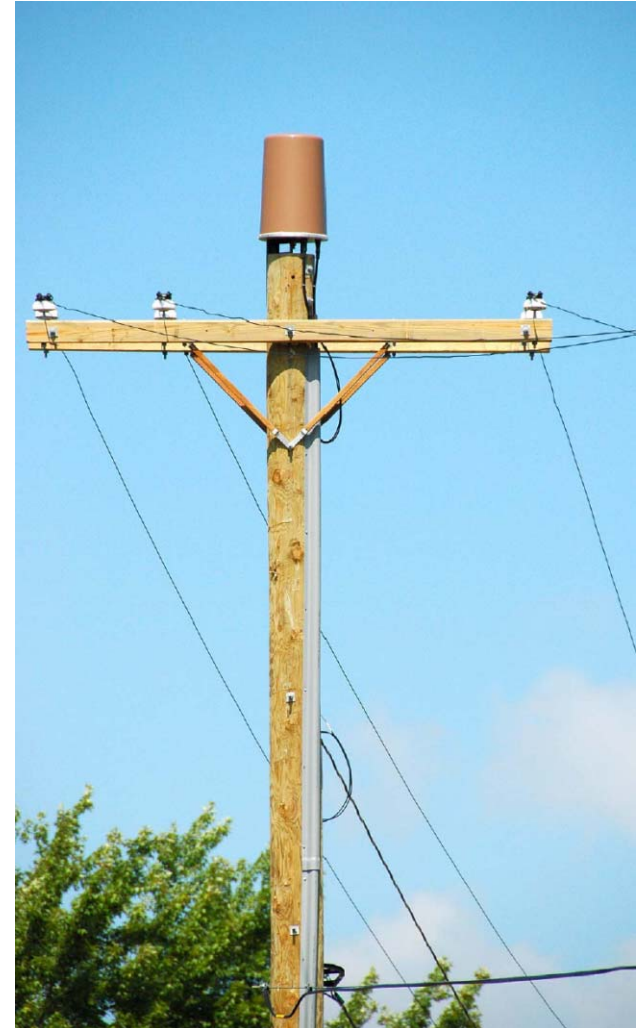
Types of Wireless Pole Attachments

- Wireless infrastructure providers attach antennas to utility infrastructure. This includes the use of poles for the deployment of specialized technology like DAS.
- A distributed antenna system (DAS) is a network of spatially separated antenna nodes connected to a common source via a transport medium that provides wireless service within a geographic area or structure. DAS antenna elevations are generally near the clutter level and node installations are compact.
- DAS nodes are remote radiating points interconnected to a base unit (a hub). Typically, node equipment comprises an antenna and a small radio head mounted on existing distributed structures, such as lamp posts or utility poles.

Benefits of Wireless Pole Attachments

- Pole attachments provide a spectrally-efficient wireless solution. This efficiency will take on increasing importance as propagation characteristics demand a smaller nodal approach to wireless deployment.
- Pole attachments are consistent with Congress's intent to utilize existing assets in the public rights-of-way.
- Many local governments express a preference for wireless deployment that utilizes existing “vertical real estate.”

Examples of Wireless Pole Attachments



The FCC Recognizes that Wireless and DAS Attachments Are Vital Assets that Serve the Public Interest

“Providing wireless carriers with access to existing utility poles facilitates the deployment of cell sites to improve the coverage and reliability of wireless networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better provide telecommunications and broadband services and increase competition and consumer welfare.”

Public Notice, DA 04-4046 (2004)

The FCC Recognizes that Wireless and DAS Attachments Are Vital Assets that Serve the Public Interest

In Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers, Order on Reconsideration, 14 FCC Rcd 18049, 18074 ¶ 72 (1999), the FCC declined to establish a presumption that space above what has traditionally been referred to as “communications space” on a pole may be reserved for utility use only. Thus, the only limits for antenna placement access are “where there is insufficient capacity, or for reasons of safety, reliability, and general acceptable engineering purposes.” 47 U.S.C. § 224(f)(2).

Public Notice, DA 04-4046 (2004)

The Current Rate Structure Is Not Working for Wireless Attachers

- In comments, many utility companies dispute the applicability of the telecommunications rate to wireless attachers.
- In practice, some utility companies often offer wireless pole attachment agreements on a “take it or leave it” basis with unlawful rates and unreasonable terms and conditions.
- Wireless attachers have often been offered only unlawful “market rates” *from two to twenty times* greater than the regulated telecommunications rate.
- The Commission’s current rules, which encourage good-faith negotiation, fail in the face of such tactics.

The FCC Should Make It Clear That Wireless Attachers are Entitled to the Telecommunications Rate

- The Supreme Court, federal courts and the Commission all have recognized that “[w]ireless carriers are entitled to the benefits and protections of Section 224.”
- Section 224(e)(1): “The Commission shall... prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.” The Commission has recognized that “[t]his language encompasses wireless attachments.”
- Section 1.1409 already prescribes a “per-foot” formula, and the one-foot presumption can readily be rebutted per Section 1.1418. The Commission should clarify that these rules apply to wireless attachments.
- **The Commission should adopt an explicit rule that wireless carriers are entitled to access to utility poles on a non-discriminatory basis at the regulated telecommunications rate, on a per-foot basis.**

The New Wireless Rate Rule Should Explicitly Apply to the Pole Top

- Congress intended existing utility infrastructure to be utilized for the deployment of wireless services to consumers.
- Although the pole has ‘only one top’, it also has only one middle, and one bottom – each suited and desirable for different purposes (*i.e.*, transmission, cable and other attachments).
- To permit pole owners to charge monopoly rates for any part of the pole is contrary to the statutory purpose of pole attachment regulation.
- In the unlikely event that more than one wireless attacher wants access to the same pole top, the Commission could establish rules to resolve access.

Rate Issues Are Irrelevant Where Access to the Pole is Denied

- Some utility companies discriminate against wireless attachers not only with respect to rates, but the terms and conditions that deny access in the first instance.
- Some certified states fail to implement policies reflecting FCC regulations providing for fair and equitable pole access.
- Wireless infrastructure providers confront many objectionable practices including:
 - Denial of access to pole tops, or space above pole tops for height extensions
 - Blanket denials for pole access under the pretext of safety/reliability concerns
 - Unreasonable delays in obtaining pole attachment agreements, and in make-ready
 - *The FCC can remedy these barriers to entry by taking a few simple steps to clarify existing best practices and the law*

Legislative and Case Law Recognition of Pole Attachment Access

- In *National Cable & Telephone Ass'n v. Gulf Power* (534 U.S. 327, 340-41(2002)), the Court determined that attachments by wireless carriers fall within the definition of “telecommunications services.”
- Further, the federal pole attachment statute defines a “pole attachment” to include “any attachment...by a provider of telecommunications service.” 47 U.S.C. 224(a)(4)
- Clarification of wireless carriers’ status as valid pole attachers provides for non-discriminatory policy and will enhance wireless competition .
- CMRS providers attaching to poles should not be required to obtain a Certificate of Public Convenience and Necessity (CPCN).

Safety of Wireless Attachments

- Some utility companies have issued blanket denials of pole access to wireless attachers under the guise of safety concerns.
- PCIA and DAS Forum members have safely attached facilities to poles owned by 98 different utility companies without a single reported instance of harm. We are committed to upholding NESC standards and support all efforts to prevent unauthorized attachments.
- Utility companies themselves use pole-top antennas for internal operations, including SCADA. Some of these same utility companies allege that wireless attachments are not safe.

Safety of Wireless Attachments

- **The FCC should require all pole owners to comply with NESC Standards and permit NESC-compliant attachments.**
- The FCC can clarify relevant safety standards that rely on generally-accepted provisions like NESC. Such clarification would not interfere with state or local safety regulations.
- To the extent that state or local regulators establish safety standards, they are generally based on NESC provision (e.g., Oregon).

Pole Access Request Timing

- **The FCC should take affirmative steps to enforce the 45-day deadline by which utility companies must respond to request for access**
- Wireless infrastructure providers often face unreasonable delays in obtaining pole attachment agreements
 - Negotiation periods have extended up to *three years*
 - Many utility companies have succeeded in prohibiting pole access by offering unreasonable attachment agreements and refusing modifications. In these cases, the only recourse attachers have is to challenge the utility company in court, which is expensive and time-consuming

Make-Ready Timing

- **The FCC should (1) establish and enforce reasonable timeframes for the completion of make-ready work and (2) allow wireless attachers to hire qualified contractors to perform field surveys and make-ready where the utility cannot or will not meet reasonable deadlines.**
- New York and other states have already recognized the problem of make-ready delay and imposed reasonable timeframes for make-ready completion (e.g., 45 days).
- Members routinely experience delays of 4-9 months for some utility companies to complete make-ready work. However, our members themselves have been able to complete make-ready in as little as two to three weeks.
- Members have also experienced delays of up to six months for simple requests for power.

Wireless Pole Attachment Reforms

- Cost-based rate structure;
- Confirmation of right of wireless attachers to pole top access according to reasonable terms and conditions; and
- Clarification of safety standards and make-ready timelines.

Contact

Jackie McCarthy

Director, Government Affairs, PCIA and The DAS Forum

(703) 535-7407

mccarthyj@pcia.com

Mike Saperstein

Public Policy Analyst, PCIA and The DAS Forum

(703) 535-7401

sapersteinm@pcia.com